

'Foreign Land Claims and Acquisitions in Madagascar:

What Reality? What Regulations On the Ground?'

conference paper

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Abstract:

In 2009, the 1.3 million hectare agricultural project planned in Madagascar by South Korean company Daewoo Logistics exemplified the paradoxical position of the Malagasy State concerning land management. The State was in the same time imposing the development of mega farm and implementing a land reform to secure local land rights. This Daewoo's project, now abandoned, also curtailed a diversity of smaller land acquisition processes led by foreign or national investors. This article analyses what are, on the ground, the formal or informal regulations of these investments in the agricultural sector. It exposes the central role the State carries out in the promotion and in the development of these investment projects. It reveals that the State's central position does not allow an effective regulation of the investments but strengthens its control of land access at the expense of the local authorities and communities and to the detriment of a better security for the local land rights. This lack of openness in land governance results from: the investors' practices, the persistence of a "State-Ownership reflex" and the absence of strong social reactions at the local level.

Résumé:

En 2009, le projet sud coréen de Daewoo Logistics portant sur 1,3 millions d'hectares a révélé la position paradoxale de l'Etat malgache relativement à la gestion du foncier. Ce dernier imposait le développement d'immenses projets privés agricoles et menait dans le même temps une réforme foncière visant la sécurisation foncière des droits fonciers des populations. Ce projet sud coréen, aujourd'hui abandonné, a également masqué une diversité de projets d'acquisitions foncières de moindre ampleur portés par des investisseurs étrangers ou malgaches. L'article analyse quelles sont les modes effectifs de régulation de ces investissements dans le secteur agricole. Il montre que l'Etat joue un rôle clé dans la promotion et le développement de ces projets investissements. Il révèle également, sur la base de l'étude des modalités d'accès au foncier des investisseurs, que la position centrale de l'Etat ne permet pas une régulation effective des investissements mais renforce son contrôle de l'accès au foncier, au détriment d'une sécurisation des droits fonciers des populations. Ce manque d'ouverture en termes de gouvernance foncière s'explique par les

stratégies des investisseurs, le maintien d'un réflexe de domanialité et l'absence de contestation sociale forte au niveau local.

Introduction

Large-scale agricultural or forestry investments spark off numerous interrogations on their impacts for Southern countries and on their potential linkages with local socioeconomic activities (Cotula et al., 2009; Shepard and Mittal, 2009; Von Braun and Meinzen-Dick, 2009; Mann, H., 2010). The main issues deal with resources access and land use competition between investors and local population. In diverse Southern countries, rural communities' land rights are not legally recognized and the land is considered as State-owned land. Large-scale transfers (lease or purchase) risk ignoring and breaching these rights. In this respect, one of the seven FAO, UNCTAD, World Bank's principles for Agricultural Investment is "*respecting land and resource rights*", and repeats the same recommendation for ten years (Borras and Franco, 2010): to legally recognize local land rights.

The Malagasy case attracted a great deal of media attention due to the scale of the 1,3 millions ha agricultural projects of the South Korea company, Daewoo Logistics, and the effect it had in catalyzing social movements against President Ravalomanana. In addition to exemplify the sensitivity of land issues, this project underlined the paradox of the government's land management (Teyssier and al., 2009). This former government initiated a new land reform aiming, in accordance with international institutions' recommendations and with the population's expectations, at the recognition of local land rights and at the decentralization of most of the land resources towards local authorities. However, in the same time, it promoted foreign direct investment and pledged investors to lease them large surface partly already appropriated.

The abrupt abandonment of Daewoo's agricultural projects and the former government's deposition, accused inter alia of selling off the nation's heritage to foreigners, didn't stop all the agricultural or forestry projects aiming to valorize more than one thousand hectares. On the 52 agricultural investment projects announced since 2005, one third collapsed but thirteen are currently in progress and are awaiting the approval of government-allocated land leases, and fifteen other projects are in preparation (Andrianirina - Ratsialonana and al., 2010).

This article analyzes, in this land reform context, what are the effective modes of regulation of these agricultural investments? And, what are their potential impact on local population's land rights and those of investors? It aims to study the « social working of law » (Griffiths, 1992), by analyzing the way laws are "*interpreted by the actors in charge of their implementation, in their context and with their own ability to act, then, by the way the concerned actors react to seize them or, in the contrary, to protect themselves from their effects*" (Lavigne Delvigne, 2006: 59).

First, the article describes the dynamic of investments in the agricultural sector. The second part exposes the central role that the State carries out in the promotion and in the development of these investment projects. The following parts show that the central position of the State does not allow an

effective regulation of the investments but strengthens its control of land access at the expense of the local authorities and communities and to the detriment of a better security for the local land rights. This lack of openness in land governance results from: the investors' practices (part 3), the persistence of a "State-Ownership reflex" (part 4) and the absence of strong social reactions at the local level (part 5). A last part concludes on the importance to strengthen local individuals and communities' negotiation power through the consolidation of the ongoing land reform and a better consideration and remuneration of the assets (land, labor, etc.) they invest in the project.

The investment dynamic has slowed down without truly dying out

The civil society, the decision makers as well as the international organizations don't have enough information on the number and the scope of investment projects in the agricultural sector. Moreover, the information on these projects, negotiated with utmost discretion, is scarce and not certified. Thus, the divide is great between the media rumor of these land acquisitions and the quality of available information. This article, in the continuity of the studies about biofuel and land acquisitions in Madagascar (Uellenberg, 2008 & 2010 ; Burnod et al., 2009) and other African countries (Cotula et al., 2008 & 2010) lays out the status of land investment projects, by differentiating the projects that were simply announced from the projects that are effectively underway (e.g. Andrianirina - Ratsialonana and al., 2010 for a more detailed presentation). Data supplied by previous studies on agricultural investment have been further developed and completed through fifty interviews with agents from public institutions, regional or local governments, with private operators, populations, and key individuals. The interviews were conducted in the capital city, Antananarivo, and in two regions coveted by investors (Boeny, Sofia).

In Madagascar, since 2005, several projects of large-scale acquisitions of farmland have been announced or revealed in media reports. Daewoo Logistics and Varun have attracted much media attention due to the scope of land area targeted, respectively 1 300 000 ha and 465 000 ha (Teyssier et al., 2009). But these latter have masked about fifty agricultural projects of lesser scope, most of which are still in process (Andrianirina - Ratsialonana and al., 2010). An overall total, close to 3 million ha of land were coveted (65% for food production, 32% for biofuel, 3% for forest plantations). This coveted land area is significant considering the 2 million ha cultivated by 2,5 million family farms. It also represented, although the methodologies and definitions used are questionable, 15 to 37% of potential cultivatable land (these lands, considered as arable without ever really being non-utilized, are estimated to be about 15 to 20 million by FAO (2007), and 8 million by the Ministry of Agriculture (2008)).

The abrupt abandonment of Daewoo's and Varun's agricultural projects and the new government's assumption of power, coupled to the world financial crisis and the stabilization of food prices, the investments flow have strongly slowed down. On the 52 announced projects, one third of the projects didn't go further than land prospection or stopped (Figure 2). Nevertheless, the flow of investment has not truly died out. The targeted land area totals about 150,000 hectares thus 20 times less than the initial announcements (Figure 2).

The investment dynamic includes exclusively private investors of medium size and no sovereign funds. Whereas the projects initially announced targets mainly food crops (65% of coveted land),

the on-going projects primarily aim to produce agro-fuels (96% of coveted land). Exportation is the common point among these biofuel projects.

Thirteen private companies started their agricultural project. They are mainly based on foreign investments (11 on 13), the most often of European origin. They aim to produce Jatropha based biofuel (10 on 13). These companies, mostly little experimented in the agricultural sector, plan to develop large-scale plantation to an overall land area of between 5 and 30 000 ha, based on mechanization and wage system. They only carried out their first plantations (nurseries or trials). The surfaces effectively cultivated represent only 23,000 hectares.

Fifteen other 15 companies are drawing up their investment plan: five foreign companies are planning large-scale plantations of cereals or jatropha, while ten Malagasy companies are targeting sugarcane-based biofuels production, hoping to add value to the raw material produced by small farmers.

In the following parts, the article focuses on agricultural projects planning to develop large-scale plantations, situations where land allocations risk resulting in loss of land for local people.

Figure 1 : from announced to ongoing projects

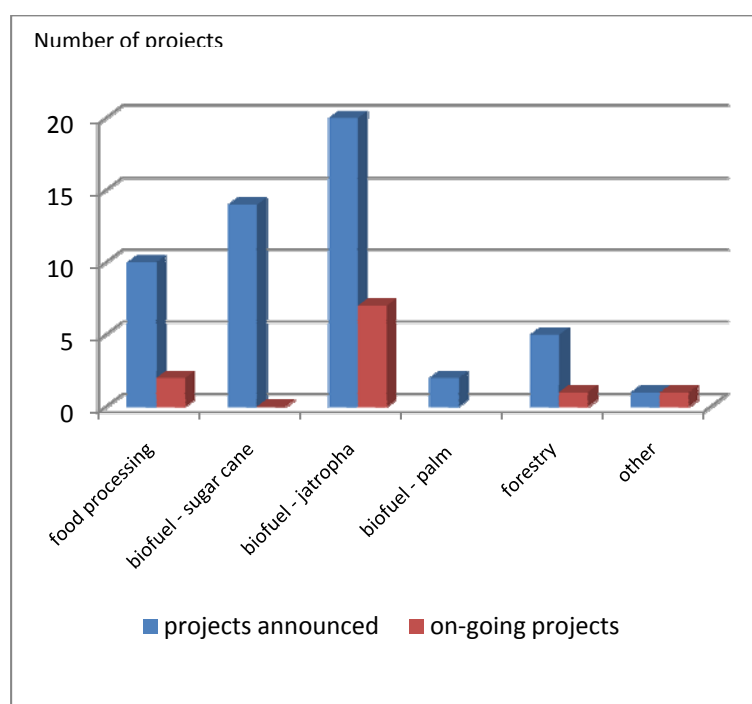
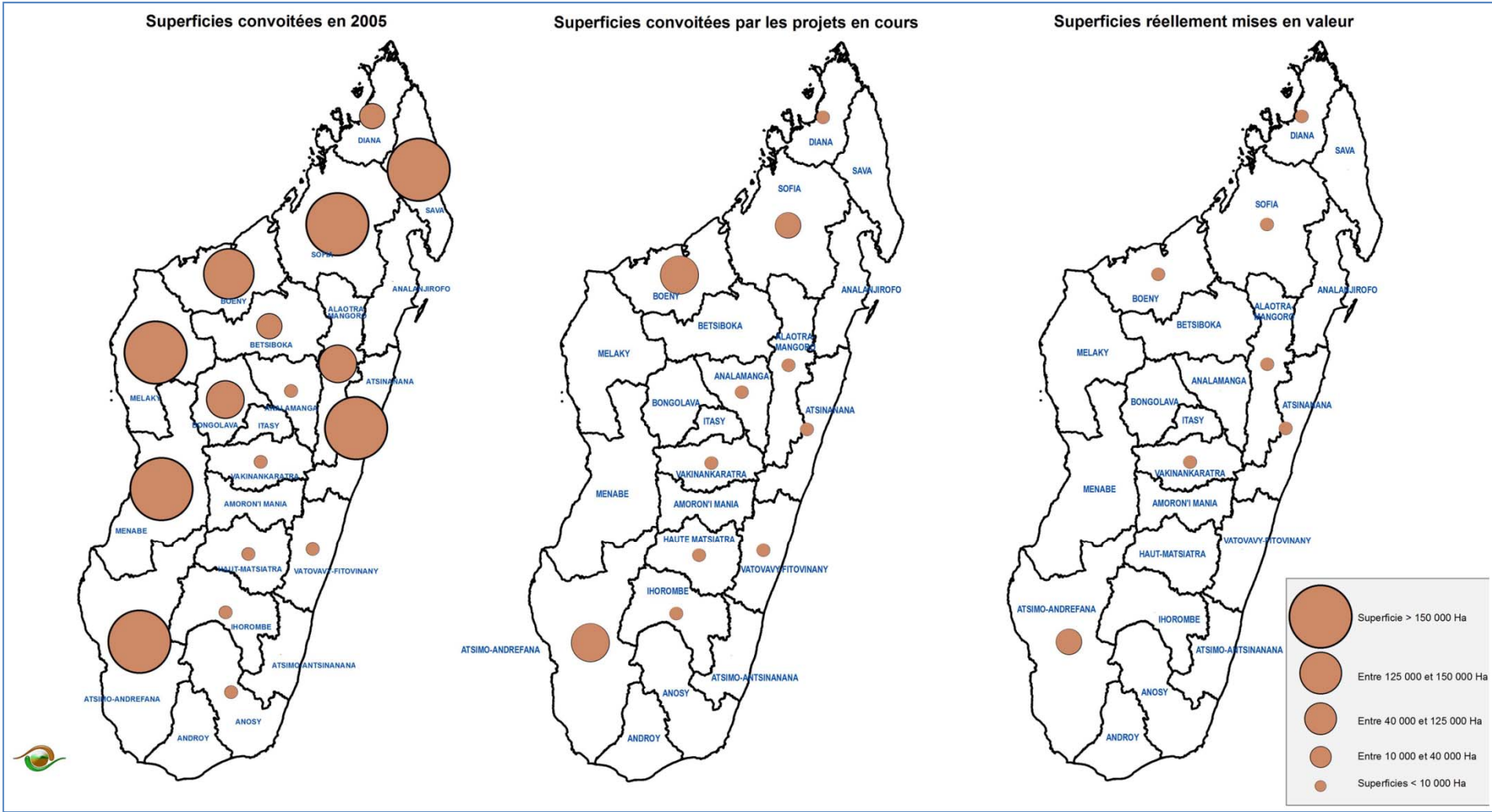


Figure 2 : to coveted surfaces to actually cultivated land by investors



The central role of the State: an opportunity for more regulation?

The State played a major role in the promotion and the development of these investment dynamics. First, it implemented an incentive policy for investment. Following an evaluation by the World Bank in 2005 on the investment climate and in compliance with its recommendations, the government focused on the promotion of foreign investments. It did it through: the creation of one stop provider office for investors (Economic Development Board of Madagascar, EDBM) in 2006, the announce in the Madagascar Action Plan (MAP) of the policy will to increase investment in 2007, and the adoption of an investment law in 2008 mentioning the authorization of land acquisitions for non-national investors. This was confirmed by the multiplication of direct foreign investment flows from 95 million USD in 2005 to 1 445 millions USD in 2008 (CNUCED, FDI data basis, March 2010), resulting mainly from investment in the mining sector.

Then, in the agricultural sector and contrary to the secondary or tertiary sectors, the State has a strong influence on the establishment of investment projects. He controls the access of a major factor of production: land. When the coveted land is State-owned land, investors must address the state-owned land services and, when the land area is bigger than 50 hectares, they must obtain agreement from the Ministry of Town and Country Planning.

Lastly, in accordance with the Decree to Make Investments Compatible with the Environment (MECIE Decree), the State, through the National Office for the Environment (ONE), has the right to inspect the content of the investment project. All agricultural projects larger than 1,000 hectares must obtain an environmental license. This license is issued only after the validation of an impact assessment that includes environmental and socio-economic criteria, including the populations' rights. Recently, the State owned land services and the ONE decided to deliver the land contract only if the investor gets the environmental license.

The State has legal and institutional tools to promote as to regulate investment. Or, preliminary case studies reveal that the State does not actually regulate these investments. On the contrary, its strategic position gives opportunity to its representatives to promote investment without coordinating the management of public affairs at the different government level (local, regional and national) and without securing the population's rights.

Operators' land strategies

The increased role of the State representatives and this lack of openness in the land governance is explained first of all by the investors' practices who, to draw up their project and access land, benefit from strong political support.

Giving priority to political contacts instead of technical entry points, investors rarely follow the official path that invites them to see the EDBM, the State owned land services, and the ONE. Some investors address directly the government members, others the main representative of the regional governments and, and a few ones the Mayor of the local governments. They are then directed to the state owned land services, first at the regional level, subsequently at the national level.

Except one consortium of Malagasy investors planning to buy about 20 000 ha, other operators, all foreigners, want to lease land and not to buy it. These latter hope to get a 50-year lease and

land rents about 2 000 ariary/ha (i.e. about 0.80 USD). Legally, the outright purchase of land by foreigners is a tricky issue. Since 2008, the new law on investment allows it through the delivery of an “autorisation d’acquisition” for all foreign investor holding a malgasy company (Loi N° 2007-036); which is in practice quite easy because the only constraint is to have one of the associates registered as a resident. However, the modalities of implementation of this authorization are still fuzzy in the absence of the enabling legislation and effective demand from foreigners. According to the investors, this preference for leasing arises from a desire to limit the initial capital costs, the immovability of the capital, and the risks of social protests. A lease also allows them, in the event of technical, economic, or political problems to stop their project at a lower cost.

The investors hoping to develop large-scale crops seek land with similar characteristics: good pedo-climatic conditions adapted to the planned crop and mechanization; from 10 000 to 30 000 hectares; non- or under-productive, un-owned land - the targeted land is thus supposed to be State owned land; and for the most part, the proximity of a national road or a port for the transportation of inputs (large economic investors, like Daewoo and Varun, were not as limited by the constraint of accessibility and envisaged the construction of infrastructure). They identify these lands thanks to advice from a Malagasy intermediary, the Regional services or thanks to maps and aerial identification).

Investors mainly look for *tanety* (land located on plateau or at the top of the side hill) and not for shoal land suitable for rice production. These *tanety*, even if they are qualified as non or under valorized by investors, are likely to be pastures or reserve of woodfuel (woodfuel being the first household’s source of energy). Moreover, investors look for large land area in one-piece which increases the probability to include crop plots. Thus, land targeted is likely to be already claimed by local people.

Contrary to all expectations concerning the potential arable land announced (8 million to 20 million hectares), the investors found themselves competing to access land (on the 7 jatropha project underway, 3 cases of competition were observed opposing until 3 operators). This competition proves that the land fitting all the favorable investment criteria was not as extensive as initially forecasted. Moreover, this competition strengthens the State’s bargaining power in these “out of the market” transactions: the government chose to lease out or not its lands but also the identity of the beneficiary.

Thanks to their political support, the investors have easily obtained a positive agreement from their interlocutor (main representative of regional and local government) with regard to the establishment of their project. The perspective to develop economic activities in their rural areas, to benefit eventually to personal advantages and to raise the stakes in case of competition among investors also incited these interlocutors to give a positive opinion on the project.

Currently, no lease contract was duly signed by the Ministry of Town and Country Planning. One Indian operator got a 5 000 ha land lease, signed by a former main representative of the regional government. Since 2007, he cultivates Maize without any success on a 1 000 ha plot. Another operator (GEM) established a 30 000 ha Jatropha plantation through a land lease negotiated with certain Mayors (but only two thirds of the plantations would have been successful). As the deals concern State owned land which is, according to the law, managed by the State-owned land services, the deals are not recognized by the State and illegal. The other operators have realized

first agronomical trials on little plots leased or lend out by landowners or Mayors. They have initiated the procedure to get a land lease for in average 2 years but they have not yet obtained a formal agreement from the State-owned land services and the Ministry. This waiting, lengthened by the actual political crisis, is consequent for investors who want to get a contract as soon as possible not only to start the fieldworks but also to get funding from Banks and shareholders. The investors, satisfied by the low price of the rents (less than 1€ per hectare), did not well evaluated the high transaction costs to access land. This waiting contributed to discourage certain operators from investing.

The State keeps the entire control of land access

Before 2005, the State was the owner and the manager, through the State-owned land services, of all the non-titled land. This power has been challenged by the new land laws of the reform underway. Now, non-titled land but occupied land is no longer State-owned. Land claimed by local people acquires the status of “non-titled private property” and is the administrative responsibility of the local governments. These latter have local land offices which are responsible, with a local recognition commission comprised of elected representatives of the village and neighbors of the concerned claimant, for recognizing private property rights and issuing land certificates. In April 2010, 350 local land offices were created and issued 52,000 land certificates.

As a result of the new legislation, State-owned land now consists only of land registered in the name of a public actor or unoccupied land on which no claims have been made. Thus the State, via the *services des domaines*, can neither lease nor sell land that includes or encroaches upon titled or occupied land, apart from exceptional cases when the Council of Ministers can authorize expropriation and compensation procedures.

To make a registration or to get a land lease, the State-owned land services demand investors to respect several steps in order to verify that the concerned land does not encroach or include titled private property, the special status zones (national parks, land reserve) or un-titled private property. However, on the ground, and on the basis of cases studied – where the local governments did not have local land offices, certain practices bypass the safeguards protecting the population’s land rights.

First, the investor must obtain the Mayors’ agreement. But the Mayors, who are often under political and economic pressures, rarely refuse the development of a project on their rural areas.

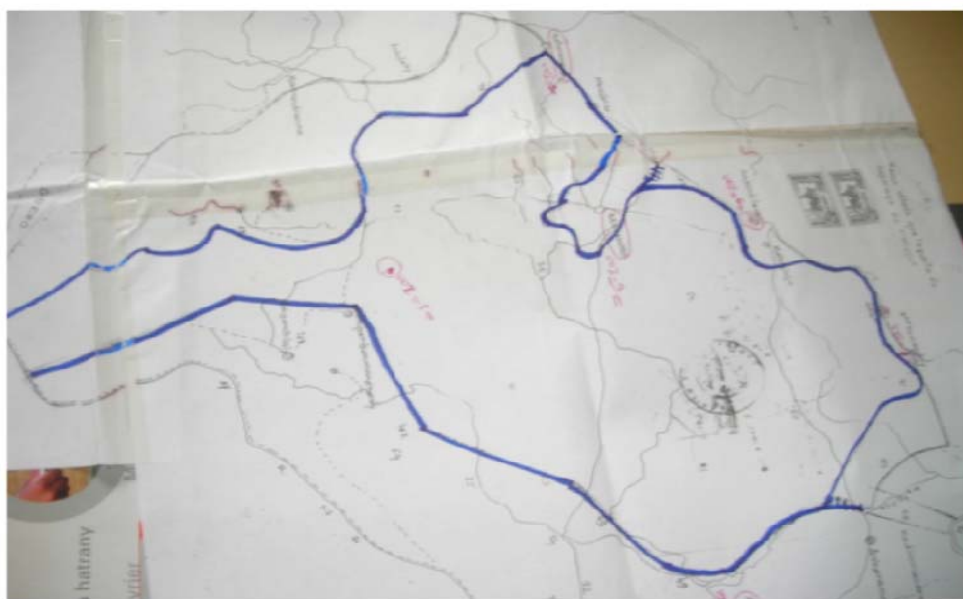
Then, the demarcation of lands coveted by the operator is realized on the basis of topographic maps. These maps used by the State-owned land services are not necessarily up-to-date and do not consider land comprising untitled private property. Thus, they cannot avoid encroachment. In theory, the State-ownership recognition commission’s fieldwork must compensate for the absence of this systematic inventory. Comprised of a State-owned land service agent, a topographer, the mayor and leaders of village concerned, the commission has to mention in a statement the presence of already owned lands on the coveted surface. The commissions are actually active but they often go off without the project and its land holding being really exposed to the population. Whatever the reasons are (technical difficulties due to large land areas; corrupt practices; wish to see the project works), the statement booked by the commission is often restricted to the only mention “Nothing To Declare”.

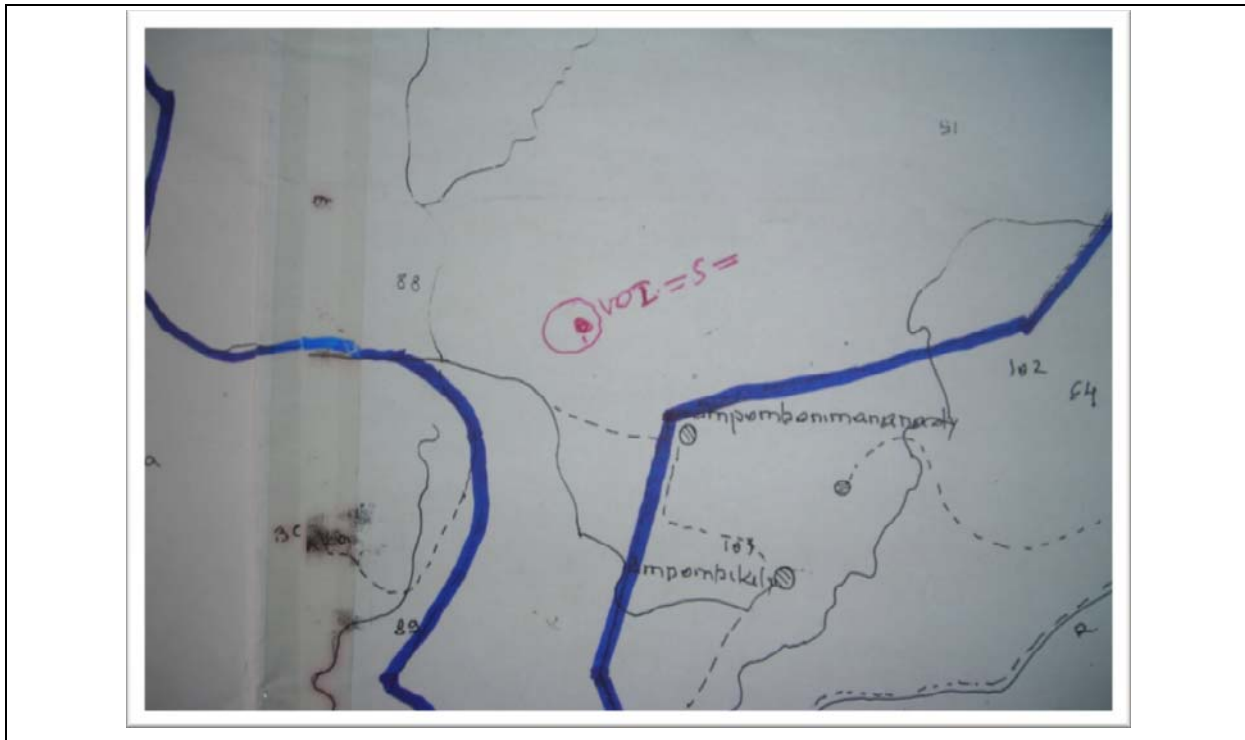
In the Sopremad and Delta Petroli cases, the statements done for respectively a 20 000 and a 30 000 hectares plot did only mention “Nothing To Declare”. And yet, in the first case, certain villagers have declared the existence of cultivated and valorized plots; in the second case, the existence of pastures was even know by the investors.

The application for registration, including the plan and the report, is passed on to the regional offices of the concerned ministries, notably those of Agriculture and Water and Forestry. Their representative can then assert their interest and defend the economic actors of their sector notably in case of opposition at the local level. Thus the dispute will certainly be resolved between the State’s technical services and the Ministries, without involving the population and under the influence of strong political pressures.

Certain members of an association (VOI in Malagasy) - association that manages a forest area within the framework of a natural resources management transfer contract – notice the presence of the commission of the State ownership recognition. They state that the area requested by the investor includes their forest areas – rich in wood fuel and partly cultivated. Contrary to the former mayor, the actual mayor has actually agreed the project on the recommendation of the main representative of the regional government. Other members of this association announce their fears to the representative of the Ministry of Water and Forestry’s regional office. These latter demands that the boundaries of land targeted by the registration be rectified and the forest areas coming under the responsibility of his Ministry be excluded (photos 1 and 2). However, a representative of the Ministry, in a higher hierarchical position, opposes itself to new demarcation in order to protect the investor’s interests and to avoid the slowing down of the application. The dispute was not resolved at the time of the field interviews.

Photos 1 and 2: Forest territories under natural resource management contracts (red circles) included in the land coveted by the lease (blue delimitation)





Lastly, the applications for land lease are passed on to the central State-owned land service and the Ministry of Town and Country Planning. In the present political situation, neither the State agent nor the investors want to conclude the contract, for fear of weakening the present government or obtaining a contract contestable by the next government.

All these above mentioned practices illustrate the persistence of a “State Ownership reflex” (Teyssier et al., 2009). The analysis of the bundle of rights cannot be isolated from the analysis of the bundle of power (Ribot et Peluso, 2003). Even if the bundle of rights recognized by the State is now larger, the powers in term of land management have not been totally redistributed. Whether the new laws are more or less well mastered, ignored or interpreted differently, the qualification of the coveted areas as state owned land allow the local, regional or national decision makers to manage their territory to their liking. Good examples are the support given by the former government to Daewoo’s project and regional government to smaller projects. They also illustrate the difficulty for the public decision makers to reconcile the recognition of local land rights and the economic dynamics they promote and are depend on (e.g. Livre Blanc, 2009). The qualification of the coveted areas as state owned land also allow the State owned land services to keep up the entire control of land access without associating the local government and the population. Lastly, this qualification gives the opportunity to accelerate handling of files and to respond to the investor’s time limits.

What are the social reactions?

A strong contrast appears between the social movement against Daewoo and Varun’s projects at the national level and the social reaction with regards to smaller agricultural project at the local level.

These weak reactions against a project establishment or the land acquisition are a result of a low level of information. The consultation of local people is only compulsory within the framework of the environmental impact assessment. As observed in other countries (Sulle and Nelson, 2009), local people are neither properly represented nor actually informed about planned investments, and their propositions do not force the investor to withdraw or to do substantial modification of the project.

These weak reactions are also a result of the way land issues are handled. During the consultation, the land issues are not central. On one hand, the consultations are active or planned only after the commission of State ownership recognition's fieldworks, which is supposed to have resolved the potential land dispute. On the other hand, the villagers focus their claims on services (school, health center, roads) and jobs.

Outside these formal consultations, when users and the owners of the parcels – including titled and untitled private property – are effectively informed, they are able to assert their rights on the lands coveted by the operator. Their claims depend on the type of plot but they are strongly weakened by the promises made by investors. Even if the farmers do not possess a certificate, they rightly consider themselves owners and oppose that their cultivated or wooded lands be registered in the name of the State and transferred in a lease. These demands strike a chord with the investors' discourses stating "to not want to infringe on" and they are not followed by stronger action – even if their land are being included in land areas earmarked for transfer to investors. Their position concerning pastures is more mitigated. In three case studies, pastures were the objects of negotiation between the operator and the population but the consulted people accepted that the lease for this land in the exchange for compensation (preservation or development of new pastures, production of grazing crops by the investor). Above all, promises made by investors such as the creation of jobs and social infrastructures (and maybe the low participation of the breeders) weaken these claims, without giving any real guarantees to local people.

In parallel with hypothesis in the mining sector (Magrin and Van Vliet, 2005), in the first stage of contract negotiation or fieldworks, population's claims are weak due to the asymmetry of power between the parties, the promises made by the investors, the first jobs created and the absence of obvious negative impacts. There is a risk of conflict when the enterprise decreases its workforce thanks to mechanization, the project land holding limits the grazing, the local communities have time to be structured and the operator, trapped in economic logic, is reluctant to fund the promised infrastructures. Several cases of opposition occurred in the past when large-scale agricultural projects started planting. Local population's opposition to projects can be fierce and lead to plantations being burned (in Boeny region, 1 500 ha over 2000 ha of tree plantations, in Tulera Region, jatropa plantation).

Conclusion

The existing laws do not provide an adequate framework for negotiation between local people affected by land investments and the authorities, and do not guarantee respect for their rights and interests. Investors and State representatives' practices lead to the bypass of legal devices and the local communities do not resort to them to defend their interests. Thus, large-scale land

transfers to investors risk breaching local land rights and to weaken in the long term operators' land rights.

The legal recognition of local land rights is necessary but not sufficient to actually increase local communities' negotiation power in front of investors (Vermeulen and Cotula, 2010). The consolidation of the land reform, through the reinforcement and the expansion of the network of local land offices, is central to continue the difficult power redistribution in terms of land management and to legally empower local communities. The demarcation between "unoccupied land" and "non-titled private property" cannot be unilaterally defined by the State owned land services but should involve the local governments. The involvement of local land office agents and representatives chosen by the villagers, in the commission for State-ownership recognition, and in the committee of environmental impact assessment, can lead to a better respect of non titled property. Moreover, local land offices can strengthen the role of local government in land management; provide maps that can help to identify land targeted by investors, together with land use competition and even potential linkages between economic activities (agriculture, cattle breeding, wood harvesting); and, lastly, they provide a first recourse to authority in resolving conflicts.

Local communities' negotiation powers are also weakened by the low value, defined by the market or appreciated by the investors and decision makers, to land and work compared to the others assets and inputs the operators invest (capital, know-how) (Cousins, 2009 ; Vermeulen and Cotula 2010).

The regulation of these large investment projects should not be limited nor to the local level neither to land issues. A national debate should deal with the development model of rural areas and should contribute to the elaboration of a new national framework aimed at regulating and promoting responsible and fair investment. The State, NGOs, researchers and civil society should get actively involved to produce full information on these projects, emphasize the high value of the assets invested by the local communities (land, labor, natural resource), and propose, or even impose, the inclusion of local communities (community organizations and/or local governments) in contracts between operators and the State and to enforce parties' commitment.

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